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Consultation Response

Which? response to HM Treasury's consultation on a Review of the Financial Ombudsman Service

Submission date: 8/10/2025

Summary

- **We support HM Treasury's stated goal to preserve the FOS's intended purpose but believe that this goal is undermined by some of these proposed reforms.** As a successful statutory alternative dispute resolution (ADR) scheme, the Financial Ombudsman Service provides a vital option for consumers to access simple, timely and impartial dispute resolution.
- **We are not convinced that the evidence presented sufficiently justifies some of the structural and legislative reforms proposed in this reform package.** The FOS is working well in the majority of cases.
- **Some of the proposed structural and legal changes would detrimentally affect consumers' access to simple, fair, impartial dispute resolution** and see a reduction in consumer access to redress in the financial sector. In particular, we have significant concerns about:
    - The proposed amendments to the application of the fair and reasonable test.
    - Introducing an absolute time limit on complaints being brought to the FOS.
    - Making the FOS a subsidiary of the FCA.
    - Allowing the FCA to direct the FOS to determine cases in line with existing FCA guidance, firm redress schemes or s404 schemes.
    - Removing the consumer protections that form part of the FOS's ability to dismiss a case directly.
- **The existing redress framework also already enables the aim of several proposed legislative changes.**
- **We believe the reform should focus on:**
    - Improving the execution of the current regime and legislative options.
    - Developing greater collaboration between the FCA and the FOS in new areas.
    - Increasing the public transparency of the collaboration currently taking place between the FOS and the FCA.

General response

We support HM Treasury's stated goal to preserve the FOS's intended purpose as a simple, impartial dispute resolution service that quickly and effectively deals with individual consumer complaints against financial services firms.

As a successful statutory ADR scheme, the Financial Ombudsman Service provides a vital option for consumers to access simple, timely and impartial dispute resolution. With this purpose in mind, we support HM Treasury's decision not to establish a new appeal mechanism to the courts and confirmation that the FCA should not be involved in settling individual disputes.

However, we feel that a number of the structural changes proposed in the consultation paper would undermine HM Treasury's stated goal and would not be an effective or appropriate use of resources. Specifically, we have concerns that:

- The structural changes are not justified by the evidence presented.
- Implementing some of the proposed structural reforms would affect consumers' right to access to simple, fair, impartial dispute resolution.
- The existing redress framework can already achieve the goals of some of the proposed legislative reforms.

Concern 1: The evidence presented does not justify the structural reforms proposed in this consultation paper.
The review identifies that the FOS is working well in the majority of cases. This view is shared by consumer groups and some industry stakeholders.[1] Our work on consumer protection and redress across different markets has consistently shown that the system of redress in financial services functions better than in other sectors.[2]

The review notes that it is only in a 'small, but impactful' minority of FOS cases that some stakeholders had concerns that the FOS was going beyond its initial remit. We accept that with more than 25,000 decisions being made by the FOS annually[3], there likely will be a handful of cases where a potentially inconsistent decision has been made. We do note, however, that this should be considered in the light of the duty of FOS to take account of all the circumstances of the case.

In addition, we believe that some of these concerns may sometimes reflect a perception that the FOS is going beyond its remit, rather than this necessarily being the case in practice. This is because despite repeatedly asking industry to present examples of misalignment between FCA rules or guidance and FOS decisions, we have yet to see compelling evidence of this being a consistent issue. In addition, the Review finds that there is already cooperation between the FOS and the FCA, which includes work to ensure there is a shared understanding of regulatory requirements across both organisations. We

[1] In particular, FCA/FOS joint CP 25/22, July 2025, Chapter 2, at para. 2.4 highlights that some firms agree on the value of the fair and reasonable test to allow individual circumstances to be considered (p. 9)
[2] For an assessment on the effectiveness of consumer dispute resolution across a number of sectors, please see our 2021 research report on ADR schemes.
[3] 26,267 and 27,618 ombudsman decisions were published in 2023 and 2024 respectively.

acknowledge that there needs to be more coordination between the two organisations, but it should be noted that it is happening to some level already. Furthermore, we note that the FOS already has an express statutory duty to disclose to the FCA any information that might be of assistance to the carrying out of FCA objectives.[4]

Lastly, we note the absence of any impact assessment or similarly clear articulation of what decisions HMT believes would be different, or what outcomes would change as a result of these proposals. As it stands, we feel that there is insufficient evidence on the potential benefits that these changes could bring to justify the proposed scale of change.

Concern 2: Implementing some of the proposed structural reforms could affect consumers' right to access to simple, fair, impartial dispute resolution.
Fundamental principles of dispute resolution[5], as well as the existing legal framework require that FOS discretion is carried out independently and impartially. Some of these proposed reforms contradict these principles by compromising the impartiality and statutory independence[6] of the FOS and its role as a viable alternative to the courts. In doing so, they undermine the stated goal of HM Treasury's reform package to preserve the original intent of the FOS as a simple, impartial dispute resolution service which quickly and effectively deals with complaints against financial services.

In practice, these proposals may prevent consumers from receiving justice when things go wrong. Over time, this may lead to an erosion of consumer confidence and trust in the redress system and the financial sector.

For these reasons we have concerns with the following proposals:

- Adapting the fair and reasonable test.
- Introducing an absolute time limit for introducing complaints to the FOS.
- Making the FOS a subsidiary of the FCA.
- Allowing the FCA to direct the FOS to determine cases in line with existing FCA guidance, firm redress schemes or s404 schemes.
- Removing the consumer protections that form part of the FOS's ability to dismiss a case directly.

Concern 3: The existing redress framework can already achieve the goals of some of the proposed reforms.
Existing agreements and ongoing voluntary collaboration under the existing framework for redress should be sufficient to achieve the policy intent of some of the proposed changes in this consultation paper, without requiring further legislative changes. These include:

- The proposed approach for dealing with law which may be relevant to a case.
- Implementing a mechanism obliging the FOS to refer questions of rule interpretation to the FCA, including the power for any party to request an interpretation.

[4] As outlined in section 232A of the Financial Services and Markets Act 2000.
[5] As underlined in the ADR provisions of the Digital Markets, Competition and Consumers Act 2024.
[6] As outlined in section 225 of the Financial Services and Markets Act 2000, the FOS is statutorily independent for the purposes of dispute resolution and must be a separate statutory corporate body.

- Implementing a mechanism obliging the FOS to refer wider implications issues to the FCA, including a power for any party to request a referral.

We explore the specific reform proposals in more depth in our answers to the relevant consultation questions below.

We believe that the necessary approach to FOS reform is more moderate than has been set out by this proposed reform package.
To address the identified issues, major structural change is not required. We think the necessary approach must focus on:

- Improving the execution of the current regime and legislative options.
- Developing greater collaboration between the FCA and the FOS in new areas.
- Increasing the public transparency of the collaboration currently taking place between the FCA and the FOS.

Improving the execution of the current regime and legislative options.
As we set out in our previous consultation response[7], we see that there is scope for the FCA to better exercise its existing supervisory and enforcement powers in ways that support the FOS to deliver on its intended purpose. For example, we believe that improved supervision of professional representatives could help to address the poor practice among a handful of firms that has historically increased the burden on the FOS through large volumes of unevidenced complaints. Similarly, we believe there are opportunities to support the timely identification of, and response to, mass redress events through greater use of the FCA's existing powers under sections 404 and 384 of FSMA.

Developing greater collaboration between the FCA and the FOS in new areas.
The consultation paper highlights that there is already cooperation between the FOS and the FCA, which includes work to ensure there is a shared understanding of regulatory requirements across both organisations. The previous Memorandum of Understanding (MoU) between the FCA and the FOS from November 2024 explicitly clarified that the two organisations would work together to achieve consistency on the interpretation of regulatory requirements where they are relevant to the resolution of disputes. In addition, the recently updated MoU from July 2025 between FOS and the FCA reflects a commitment to further increase the collaboration between the two organisations. It does this by introducing a new section detailing how the FCA and the FOS will work together on potential wider implications issues. We see these as positive first steps to improve coordination between the two organisations.

However, we also believe this collaboration could go further in other areas. For example, we have consistently called for the FOS and the FCA to work together more efficiently particularly in how they analyse and share data and insight on complaints. The FOS already helpfully publishes case decisions, provides case studies of how it approaches and reaches decisions in key areas, and regularly reports statistics about the type and number of cases it receives. To take this further, there is more it could do to shine a light on where financial services providers are falling short. For example, the FOS could publish not just uphold rates for different products but more detailed metrics on the reasons why complaints are

[7] See our previous consultation response here.

upheld to improve visibility of issues affecting consumers. This would support the FCA in exercising its regulatory obligations.

Increasing the public transparency of collaboration currently taking place between the FCA and the FOS.
We agree with the government's intention to further improve the public transparency of collaboration efforts between the FCA and the FOS. We agree that increasing collaboration alone is not enough to address stakeholder concerns as stakeholders need to be aware of the collaboration taking place. We have consistently highlighted[8] that a lack of this transparency is fueling industry perceptions of the FOS acting as a 'quasi-regulator'.

We are therefore supportive of the intention to improve and enhance the information that the FOS publishes about its case decisions. We explore this in more detail in response to question 10. We also agree, as suggested in the consultation paper, that there could be more transparency of the engagement occurring between the two organisations to clarify the interpretation of FCA rules.

Responses to consultation questions

Question 1: Do you agree that, where conduct complained of is in scope of FCA rules, compliance with those rules will mean that the FOS is required to find a firm has acted fairly and reasonably.

We disagree with the proposed adaptation to the fair and reasonable test. We believe the fair and reasonable test should be retained in its current form for three key reasons:

- The proposed adaptation would undermine the intended statutory mandate of the FOS. The proposed adaptation incorrectly constrains the broad intended meaning of 'fair and reasonable' to solely the actions of the firm. This amendment implies that 'fair and reasonable' should only relate to the actions of the firm, not what is 'fair and reasonable in all circumstances of the case', as is set out in statute. The statutory test is designed to assess the outcome and impact on the consumer, not just the firm's process. This is a much broader remit that allows the FOS to reach an impartial view between the firm and the consumer.
- FCA rules alone are not sufficient to effectively determine individual cases. FCA rules are not the only factor that the FOS should take into account when determining a case where FCA rules are relevant. FCA rules provide a floor, not a ceiling, for expected conduct and are often not comprehensive enough to cover every scenario or supporting legal requirement. In some cases, for example in relation to insurance, consumer credit or pensions, FCA rules are often less detailed than the underlying law, including in relation to procedural issues[9]. In addition, individual circumstances

[8] See our previous consultation response here.
[9] See the FOS decision DRN-5759798 for a good illustration of an Ombudsman taking account of the Consumer Insurance (Disclosure and Representations) Act 2012 in a detailed way over and above the FCA rules in ICOBS to ensure that a traveller was not unfairly penalised in relation to disclosure of medical conditions.

will always vary and so it is right that the FOS as a dispute resolution scheme should be given discretion to do what is fair and reasonable.[10]

- The current discretion is valued and effective. The fair and reasonable test is already working appropriately in cases where FCA rules are material to the facts of a case. The fact that FOS has rarely had judicial review cases against them succeed shows that they are exercising their discretion sensibly and proportionately.[11] In addition, as the separate FCA / FOS consultation document points out, under the current law, some industry respondents acknowledged the value of the 'fair and reasonable' test in allowing for individual circumstances to be considered, and consumer groups viewed it as 'essential'.[12] These voices have not been given sufficient weight in developing this proposal.

Question 2: Will the aligning of the Fair and Reasonable test with FCA rules still allow the FOS to continue to play its relatively quick and simple role resolving complaints between consumers and businesses.

No. The FOS's role is a simple, **impartial** dispute resolution service which quickly and effectively deals with complaints against financial services. The fair and reasonable test is the cornerstone of the FOS's ability to act impartially. Therefore, restricting the fair and reasonable test by making FOS's discretion legally subsidiary to FCA rules undermines the independence and impartiality of the FOS and as a result impedes its statutory purpose. In addition, this change could severely damage trust and confidence in the system and could likely lead to more cases where consumers will be advised to lodge court claims because their interests will be better protected.

If the government goes ahead with these proposals, it would also put financial services out of step with other regulated sectors, such as in relation to telecoms providers, where dispute resolution procedures do not include a principle that Ofcom general conditions must be given special weight.[13] In fact, the Ofcom decision-making principles say that the ADR provider must have regard to a number of factors, only one of which is 'the relevant regulations, law and terms and conditions'.

Question 3: Do you agree with the proposed approach for dealing with law which may be relevant to a complaint before the FOS

We do not think legislative change is necessary. The law is already a factor that the FOS must bear in mind and it is not appropriate for its interpretation in a particular case to be referred to the FCA as is suggested in the consultation. The current DISP rules underline the nature of the FOS as an investigative body which will include relevant legal issues. Under DISP 3.5.4, if an investigation is necessary, the parties are invited to make representations, which can include issues of law.

[10] For an example of why this is the case in a complicated case involving the Consumer Credit Act, see FOS decision DRN-5037272.
[11] As in the pensions case of R. (on the application of Options UK Personal Pensions LLP) v Financial Ombudsman Service Ltd, decided by the Court of Appeal in 2023, emphasising that the ombudsman had correctly taken into account the relevant FCA rules.
[12] FCA/FOS joint CP 25/22, July 2025, Chapter 2, at para. 2.4 (p. 9).
[13] Ofcom, Review of ADR in the telecoms sector, July 2025, see in particular 'decision-making principles' at p. 75.

Question 4: Do you consider that there are some cases that are not appropriate for the FOS to determine, bearing in mind its purpose as a simple and quick dispute resolution service? How should such cases be dealt with?

The FOS already has the ability to dismiss a case for it to be dealt with more appropriately by an alternative channel. This ability is currently subject to important safeguards, including agreement from the firm to pay the consumer's costs and also the consent of the consumer.[14] This continues to be the right approach. Any proposal to remove these basic safeguards would weaken very necessary consumer protections. This would leave consumers exposed to unnecessary harm and would undermine their right to redress other than potentially through the court process.

Question 5: Do you agree that there should be a mechanism for the FOS to seek a view from the FCA when it is making an interpretation of what is required by the FCA's rules.

We do not see it necessary to introduce this mechanism via legislation.The FCA and FOS formalised an agreement to 'seek to achieve a complementary and consistent approach…including on the interpretation of regulatory requirements where they are relevant to the resolution of disputes' in their November 2024 MoU. The review of the FOS[15], and our engagement with the FCA and the FOS to date, has also confirmed that collaboration between the two organisations is occurring.

Therefore it is not necessary to introduce a legislative mechanism with the same goal as this new agreement, especially as obliging the FOS to formally refer questions of interpretation to the FCA would come with clear risks. These risks include:

- Requiring the FCA to formally deliver a view would further increase its workload. The FCA would be obligated to consider each of these cases and give a formal (likely written) view within a certain deadline. This is in contrast to current arrangements allowing the FCA to engage more flexibly with the FOS to clarify their intention. The FCA is already under pressure in terms of resources and are currently being required to take on new statutory responsibilities, for example, in relation to BNPL, possible future changes to the Consumer Credit Act, and the remit of the Payment Systems Regulator.
- Requiring the FCA to formally deliver a view could lead to confusion, particularly for industry, around what constitutes FCA guidance and what is just an FCA 'view'. It is unclear whether the requirements to consult on guidance would continue to apply to this situation. To do so would increase the time required to publish a view, in turn delaying consumers from a case decision. This would undermine the role of FOS to deliver timely dispute resolution.
- There is a suggestion that the FCA would have the right to delay its response, which could unacceptably delay the determination of individual cases.[16]

[14] As outlined in DISP 3.4.2.
[15] As outlined in para. 2.16 of the consultation document.
[16] As outlined in para. 2.22 of the consultation document.

We do, however, agree that there could be value in more clearly outlining the steps that the FCA and the FOS have agreed to take to achieve a complementary and consistent approach on the interpretation of regulatory requirements in the MoU, similar to how the latest MoU from July 2025 has included greater detail on the steps the two organisations will take in relation to the referral of potential wider implications issues.

Question 6: Do you agree that parties to a complaint should have the ability to request that the FOS seeks a view from the FCA on interpretation of FCA rules where the FCA has not previously given a view?

Firms and consumers already have the ability to request that the FOS seeks a view from the FCA on the interpretation of FCA rules. DISP 3.5.12 states that the Ombudsman may take into account evidence from third parties, including (but not limited to) the FCA.

We do not think that it is appropriate to legislate to make this current ability a requirement. To do so would give inappropriate power to either party to challenge the FOS's decision to seek the FCA's view (or not) which could impact the timely resolution of complaints. There is also a risk that this proposed mechanism could purposefully be used by firms to delay proceedings, compromising consumers' right to timely dispute resolution.

Question 7: Do you agree that parties to a complaint should have the ability to request that the FCA considers whether the issues raised by a case have wider implications for consumers and firms?

We do not agree with this proposal as we do not think legislative change is necessary for parties to be able to refer potential wider implications issues to the FCA. Parties to a complaint already have the ability to raise potential wider implications issues independently with the FCA.

Legislative change is also not required for the FOS to refer wider implications issues to the FCA as there are already formal mechanisms in place to support this. The most recent MoU from July 2025 between the FCA and the FOS has introduced clear steps that the two organisations intend to take when dealing with issues identified as having wider implications. These detailed provisions are not present in the previous MoU.[17] Through this MoU, the FOS has agreed to refer potential wider implications issues to the FCA and the FCA has agreed to respond in a timely way.

We see particular risk with HM Treasury's proposal that the FCA will have the power to '...direct the FOS to pause relevant complaints while it considers the issue'. This would directly affect a consumer's ability to access timely dispute resolution, which HM Treasury states is a core part of the FOS's purpose.

Question 8: As part of implementing the proposed referral mechanism, do you think there are any issues which should be considered in order to ensure the mechanism works in the interests of all parties to a complaint?

[17] FCA/FOS, Memorandum of Understanding, November 2024.

As above, there is no need for the proposed referral mechanism. If it is implemented as the government suggests, it would undermine the ability for consumers to secure timely redress in individual cases. This contradicts the intention of the HM Treasury's reform package and the intended purpose of the FOS.

Question 9: Do you agree that the Chief Ombudsman should have overall authority for determinations made by FOS ombudsmen, and through that authority, should be responsible for ensuring consistent FOS determinations?

We do not currently have sufficient clarity on how this change would work in practice to support this proposal. There is a risk that by making the Chief Ombudsman legally responsible for all individual determinations of a case, it would mean they would have to personally check and sign off each decision. This would be too big a burden on the Chief Ombudsman. In the case that the Chief Ombudsman cannot or does not personally sign off each decision, it may increase the chances of a successful judicial review for procedural impropriety. We would like to see further consideration of how this proposal would work in practice.

Question 10: What approach to transparency arrangements would provide the most accessible way for consumers and firms to understand what outcomes to expect for particular types of cases that the FOS deals with?

Having more summary and periodic analysis documents *in addition* to the publishing of individual case decisions would be helpful. However, it is critical that the current publishing of individual case decisions remains. Many firms and consumer groups use published decisions to understand the causes of issues as well as early identification of emerging themes.

The statutory requirement for FOS to publish its decisions[18] was the subject of significant scrutiny and debate before being introduced, was campaigned for by consumer organisations, and then included in the Financial Services Act 2012. This material provides a valuable source of legitimate research data as well as being fully consistent with principles of open justice and transparency, which is a wider priority of the government.

There may also be opportunities to enhance this existing publishing of case decisions. For example, we have previously suggested[19] that, to make the data more accessible to stakeholders, the FOS could consider adding the reasons for upholding a complaint to the metadata provided in their existing document library.

Question 11: Do you think the package of reforms outlined above, taken together, will be sufficient to address the problems identified by the review and ensure the FOS fulfils its original purpose?

We are concerned that some of the structural reforms in this proposed package may undermine HM Treasury's goal to enable the FOS to continue to fulfil its role as a simple,

[18] As outlined in section 230A of the Financial Services and Markets Act 2000.
[19] See page 5 of our previous consultation response.

impartial dispute resolution body that quickly and effectively resolves complaints against financial services firms. For this reason we do not think that this package of reforms is the right approach and encourage HM Treasury to pursue a more moderate approach that does not involve broader structural and legislative reform. The approach should instead focus on improving the execution of the existing regime, developing greater collaboration between the two organisations in new areas, and increasing the public transparency of existing collaboration between the FOS and the FCA.

We also remain concerned that the evidence presented to support these reforms does not justify major structural and legislative change, as the FOS is working well in the majority of cases. Specifically, we have significant concerns with the proposals to adapt the fair and reasonable test, amend the timeframes for bringing a complaint to the FOS, and to make the FOS a subsidiary of the FCA. We step through these concerns in more detail in response to the relevant consultation questions.

Question 12: Taking into account the other reforms proposed in this consultation, do you think that the FOS should be made a subsidiary of the FCA? If so, what are your views on the appropriate institutional arrangements?

We firmly disagree with the suggestion that the FOS could be made a subsidiary of the FCA. To do so would undermine both the actual and perceived independence of the FOS. Importantly, compromised independence, whether perceived or actual, would have a detrimental impact on consumer confidence in the redress system. An erosion in consumer confidence could make consumers less willing to engage with particular services in the financial sector for fear of something going wrong and not being able to access independent redress.

Question 13: Do you agree that 10 years is an appropriate absolute time limit for complainants to bring a complaint to the FOS?

We do not support the introduction of an absolute time limit for consumers to bring a complaint to the FOS. We believe that an absolute time limit is counterintuitive to the long term nature of many financial products. We believe that arbitrary timelines would only prevent a proportion of consumers from accessing simple, impartial dispute resolution. This would lead to an increase in consumers that would need to go to the courts, increasing the burden on the courts and forcing consumers to pursue an avenue of dispute resolution that is significantly less accessible. This would affect vulnerable consumers disproportionately. In addition, we believe that having an absolute time limit and the associated necessary discretionary exceptions in FCA rules would inevitably create more uncertainty for individuals and could further risk undermining consumer confidence in the redress system as a whole.

We believe that the current timelines of six years from the event being complained about or 3 years from when a consumer first became aware (or ought reasonably to have become aware) that they had cause to complain are sufficient in acting as a buffer against complaints against conduct that happened a long time ago in most circumstances. These current timelines are also similar to those set out in the Limitation Act 1980 and in our view

should remain so, as any divergence from the current status quo would result in less protection for consumers.

Crucially, there is no justification given for why the long stop has been set at 10 years. This does not align with any limitation periods set out in the Limitation Act 1980 and no data on the volume of complaints that are lodged beyond this 10 year cut off have been shared.

Question 14: Do you agree that the FCA should have the ability to make limited exceptions to this time limit

We do not agree with the introduction of an absolute time limit for complainants to bring complaints to the FOS. However, if a long stop were to be introduced, then there should absolutely be exceptions to the time limit, in recognition of the long term nature of many financial products. It should be considered, however, that in developing the necessary exceptions to the 10 year long stop, the in-scope areas may need to be so broad that they will undermine the effort required to establish an absolute time limit in the first place.

Question 15: Do you agree that the FCA should have more flexibility, when investigating a potential MRE, to take steps that are designed to avoid disruption and uncertainty for consumers and firms? In addition to the proposals made above, do you think there are other tools for the FCA which should be considered?

We believe the FCA's general powers are sufficient for when a potential MRE is being investigated, and in advance of any redress system being put in place. We would have concerns that giving the FCA more discretion on mass redress events, particularly in relation to cases already being considered by the FOS, could potentially infringe on the right of individual consumers to have their cases determined independently and impartially.

We set out our views in relation to the two proposals referenced in the question below:

- Proposal 1: Amend FSMA so that, where the FCA judges that immediate pausing of the complaint handling process is in the interests of affected consumers and firms, the FCA will be exempt from the usual obligation to consult before making rules.
  As noted in the consultation paper, FSMA provides that the FCA is already exempt from the requirement to consult on rules where a consultation would be prejudicial to the interests of consumers. We do not fully understand why this current exception is insufficient and would request more information on how 'meeting this test before the FCA has fully investigated a potential MRE can be challenging for the FCA' before we can take a view on any proposed changes.
- Proposal 2: The FCA will also be able to pause the handling of relevant complaints which have reached the FOS where it considers it appropriate to do so.
  We do not think it is appropriate that the FCA could pause the handling of relevant complaints which have already reached the FOS while it is investigating a potential MRE. This would infringe on the right of individual consumers to have their cases determined independently and impartially and in a timely way, particularly as at this stage there would be no confirmation that an MRE has occurred and so a case may be delayed unnecessarily.

Question 16: Do you agree that there should be a simpler legal test for the FCA to satisfy in deciding that a section 404 redress scheme is needed to respond quickly and effectively to an MRE?

We believe that the FCA could, over the years, have been making greater use of its powers in FSMA to handle wider implications issues, for example through redress schemes under section 404[20] or by requiring redress to consumers under section 384.

We do not think that introducing a simpler legal test would resolve concerns that the FCA does not respond quickly and effectively to MREs. This is because we do not see the current legal tests as a barrier to the FCA deciding to use its powers under section 404. The legal tests[21] are appropriately subjective. For example, using the example in the consultation paper of MRE involving a small number of firms or consumers, we believe the terms 'widespread or regular' in the first legal test is sufficiently broad to capture a small number of firms or consumers. In addition, nothing in the second legal test suggests that the number of consumers affected must be significant.

We believe that there may be other factors that have contributed to the FCA's infrequent use of its powers under section 404. For example, in the correspondence between the FCA and the House of Commons Treasury Select Committee in relation to the British Steel Pension Scheme, the FCA noted concerns about far-reaching market consequences if the power was used.[22] We think that there should therefore be a focus on better empowering the FCA to exercise its section 404 powers, for example by allocating more permanent resources to enable the FCA to efficiently pursue the process set out in legislation.

Question 17: Do you agree that the FCA should be able to direct the FOS to handle complaints consistently with relevant redress schemes, or to direct the FOS to pass related complaints back to firms, to be dealt with by those redress schemes?

Our understanding is that the government is suggesting to extend the section 404B requirement in FSMA. This requirement directs FOS to determine matters in a particular way when there is a statutory consumer redress scheme under section 404. This proposal would extend this requirement to situations where the subject matter of complaints received by the FOS is covered by FCA guidance to support firm-led complaints handling, or firm-specific redress schemes, as well as a section 404 scheme. As these provisions have been carefully drafted to avoid compromising the independence and remit of FOS, we support this extension in principle.

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[20] The clear benefits of the use of section 404 powers for consumers, markets and efficient redress have been recently set out by the FCA on the use of the powers to address unfairness in motor finance mis-selling.

[21] As set out in the consultation paper at para. 4.4.10, currently, the FCA can only introduce a scheme under section 404 if: a) it appears to the FCA that there may have been widespread or regular failure by firms to comply with relevant requirements, b) it appears to the FCA that consumers have, or may, suffer loss for which there would be a remedy available in court proceedings and c) it considers it is desirable to make rules for a scheme to secure redress for the affected consumers.

[22] Correspondence between the FCA and The House of Commons Treasury Select Committee.

However, we do not agree that beyond the extension of section 404B, the FCA should be able to 'direct' the FOS to handle complaints consistently with relevant redress schemes nor to 'direct' the FOS to pass related complaints back to firms. To do so would risk undermining the independence and impartiality of the FOS. For example, in practice, there may be some scenarios where the facts of an individual case within a defined mass redress event mean that it would be insufficient to determine the case in accordance with the rules of the existing redress scheme. In this case, the FOS is a critical backstop for any unique case circumstances.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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